BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TEDDY CAVALLO Claimant VS. **CONTRACT TRAILER SERVICE** Respondent AND **PACIFIC EMPLOYERS INS. CO.** Insurance Carrier	)	Docket No. 1,043,325

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the January 20, 2009, preliminary hearing Order entered by Administrative Law Judge Steven J. Howard. Michael R. Wallace, of Shawnee Mission, Kansas, appeared for claimant. Thomas J. Walsh, of Roeland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) ordered respondent to pay claimant temporary total disability benefits commencing December 10, 2008, until he is released to substantial and gainful employment. The ALJ also authorized Dr. Ciccarelli to be claimant's treating physician.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 13, 2009, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of whether claimant met with personal injury by accident; whether claimant's alleged injury arose out of and in the course of his employment; and whether claimant gave respondent timely notice of his accident.

Claimant asserts the evidence was sufficient to show that he suffered an injury at work while moving trailer arms. Claimant also contends he provided respondent with timely notice of his accident.

The issue for the Board's review is:

(1) Did claimant suffer personal injury by an accident that arose out of and in the course of his employment with respondent?

(2) Did claimant provide respondent with timely notice of his alleged accident?

FINDINGS OF FACT

Claimant was employed by respondent as a mechanic. At the time of the preliminary hearing, claimant was suffering from numbness in his left shoulder, headaches, and shooting pains going down his spine into his left leg. According to claimant, he was injured on June 25, 2008, as he was moving trailer arms that weighed from 120 to 150 pounds.[1] He began to notice an achiness between his shoulder blades, which he attributed to picking up and moving the arms. However, as he continued moving the trailer arms, his symptoms worsened. Claimant completed his work shift but said that by the time he got home from work, he could not move and was in tears. He felt numbness between his shoulders, his left arm was numb, and he felt like nails coming into the bottom of his feet.

The next morning, claimant called respondent and talked to John Potter. Claimant said he was going to the VA. Mr. Potter is an employee of respondent but was not claimant's supervisor, nor was he a member of the management team. Claimant went to the VA Hospital in Kansas City, Missouri, where he was told not to go back to work. Claimant said he took his paperwork back to respondent. He first talked to Bob Hawes, who told him to talk to respondent's owner, Larry Kratzberg. Claimant told Mr. Kratzberg that the VA was going to keep him off work. He said that Mr. Kratzberg asked if he had gotten injured at work and that he replied, "Yes, more than likely on the trailer."[2] Mr. Kratzberg denies that claimant told him this.

Claimant had been treated previously at the VA for problems with his low back from injuries suffered when he was serving in the Army in Iraq. No one at respondent offered to provide claimant with medical treatment because they believed claimant's injury was not work related.

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[1] Although claimant testified he was injured at work on June 25, 2008, and that he first sought treatment at the VA Hospital the next day, the off-work slip from the VA is dated June 25, 2008. P.H. Trans., Cl. Ex. 2.

[2] P.H. Trans. at 10-11.

Mr. Kratzberg testified that he was told that claimant had called in saying he was sitting in his chair, had a stabbing pain in his back, and was going to the VA to get it checked out. He could not recall who took the call but said it might have been Mr. Potter. He said that a few days after claimant went to the VA, Mr. Kratzberg visited with him. He testified that claimant did not tell him at that time that he had been injured while working.

Mr. Kratzberg said he saw claimant several times between June 25 and November 24 when he brought in off-work slips from the VA. However, November 24, 2008, was the first time he heard that claimant was making a claim he was injured at work. On that day, claimant called him and asked if a workers compensation claim had been filed.

Robert Hawes is the shop foreman at respondent. He remembers that claimant stopped coming to work because of physical problems about June 25, 2008. Mr. Hawes said that claimant had called in saying he had hurt his back. He did not know if he took that call or if someone else did.

Deborah Irvin is respondent's office manager. She said normally if an employee is injured, the injury is reported to his or her supervisor, and then the employee would come to her to get a pass to go to the occupational medicine facility. Ms. Irvin said that claimant did not report to her that he had been injured at work until November 24, 2008. On that day, he called her and asked her to file a workers compensation claim on his behalf, and she told him she could not do so because he had not reported the injury five months earlier. She then turned the matter over to Mr. Kratzberg.

Ms. Irvin said she had received paperwork from the VA indicating that claimant was being kept off work. But none of those documents had any indication that he had been injured at work. In addition, the consultation note dated August 22, 2008, by Dwayne E. Jones, M.D., contains a history of ". . . subacute recurrence of cervical radiculopathy that is dated back to approximately 3 to 4 months ago."[3] This would indicate that claimant's acute recurrence of symptoms began before June 25, 2008.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the

[3] P.H. Trans., Cl. Ex. 1 at 1.

credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[6]

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as

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[4] K.S.A. 2007 Supp. 44-501(a).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[6] *Id.* at 278.

provided in this section, or (c) the employee was physically unable to give such notice.

Knowledge by or notice to a coworker of an accident does not constitute knowledge by or notice to the employer. Notice must be given to the employer's duly authorized agent or a supervisor.[7]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[9]

ANALYSIS

Claimant testified his injury occurred on June 25, 2008. He did not report an accident to anyone in a supervisory role at respondent on that date. Instead, he finished his work shift and the next day sought medical treatment on his own at the VA Hospital in Kansas City, Missouri. Claimant had been receiving treatment for his back at the VA since 2004 following an injury he suffered during his military service in Iraq.

Claimant continued to miss work due to his back problem after June 25, 2008, and his supervisors were aware of this fact. However, they were not informed that claimant's back problem was work related. To the extent respondent might have inferred a work related injury given the physical nature of claimant's job, that inference was offset by claimant's history of non-work related back problems and prior treatments for the same at the VA. And the documents from the VA that respondent was given did not indicate that claimant was injured at work. It was not until November 24, 2008, that respondent became aware the claimant was alleging a work related injury occurred on June 25, 2008. Claimant failed to give respondent the statutorily required 10-day notice and failed to give notice within 75 days of his alleged accident. As such, his claim is time barred, and benefits must be denied.

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[7] *Phillips v. Helm's, Inc.*, 201 Kan. 69, 439 P.2d 119 (1968); *Wietharn v. Safeway Stores, Inc.*, 16 Kan. App. 2d 188, 191-92, 820 P.2d 719, *rev. denied* 250 Kan. 808 (1991).

[8] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[9] K.S.A. 2007 Supp. 44-555c(k).

CONCLUSION

Claimant did not give respondent timely notice of a work related accident or injury. The remaining issues are, therefore, moot.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated January 20, 2009, is reversed.

IT IS SO ORDERED.

Dated this _____ day of March, 2009.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Thomas J. Walsh, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge